Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-189

In the Supreme Court of the United States

October Term, 1987

CHRISTINE KING and DENNIS P. KING,
her husband,
Petitioner,
vs.
DAVID W. CLARE, M.D., an individual,
THADDEUS DANOWSKI, M.D., an individual,
and SHADYSIDE HOSPITAL,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FILED ON BEHALF OF RESPONDENTS DAVID W. CLARE, M.D. AND THADDEUS DANOWSKI, M.D.

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STATEMENT OF THE CASE

In July, 1982, petitioners ("the Kings" or "the Petitioners") filed a medical malpractice lawsuit against respondents, David W. Clare, M.D. ("Dr. Clare"), Thaddeus Danowski, M.D. ("Dr. Danowski"), and Shadyside Hospital.

At the trial of the Kings' action, the trial court granted a motion for nonsuit on behalf of Dr. Danowski and Shadyside Hospital. The case was submitted to the jury as to Dr. Clare only. A verdict was returned in his favor.

The Kings filed three post-trial pleadings—a "Motion to Remove Nonsuit" as to Shadyside Hospital; a "Motion to Remove Nonsuit" as to Dr. Danowski; and an "Amended Motion for New Trial and/or Judgment Notwithstanding the Verdict" as to Dr. Clare. These pleadings were briefed and argued before the trial court.

On February 15, 1985, the trial court issued an Opinion and Order which denied all three Motions. (Kings' Petition for Writ of Certiorari at A16). Although the trial court's opinion was devoted mainly to a discussion of the Kings' noncompliance with Pa. R.Civ.P. 227.1, the trial court concluded that the Kings' post-trial motions failed procedurally and substantively to preserve issues for review. Judgment was entered on February 27, 1985.

The Kings are complaining only of the trial court's application of Pa. R.Civ.P. 227.1, not the substantive decision of the trial court. Rule 227.1 was adopted by the Supreme Court of Pennsylvania on October 19, 1983 and was made effective on January 1, 1984. This suit was tried in May, 1984, so the Rule was clearly applicable to any post-trial motion filed in this case. Rule 227.1 requires that the movant state the grounds which support the granting

of the relief requested and state how those grounds were asserted at trial. The Explanatory Comments to Rule 227.1 also codify prior Pennsylvania case law as to disapproval of the use of "boilerplate" language in post-trial motions and as to the requirement that theories in support of the motions be set forth explicitly. The trial court's opinion described in detail the manner in which the Kings' motions for post-trial relief fell short of the standards required by Rule 227.1.

The Kings appealed the trial court's February 15, 1985 decision to the Pennsylvania Superior Court. Briefs on appeal were submitted and oral argument was held before the Honorable James E. Rowley, the Honorable Joseph A. Del Sole and the Honorable Patrick R. Tamilia. The only question presented in the Kings' Brief was "Whether the Lower Court erred in refusing to grant Plaintiff's Motions to Remove Nonsuit and Motion for New Trial and/or Judgment Notwithstanding the Verdict." One of the issues raised and argued on appeal was whether the trial court erred when it found the Kings' post-trial motions so deficient that no issues were preserved for review.

On March 7, 1986, the Superior Court issued a Per Curiam Order which affirmed the judgment below. (Petition at A3). The Superior Court held that a complete review of the record led to the conclusion that under applicable law, the trial court's decision to deny the Kings' post-trial motion for failure to preserve issues for review was correct. Judge Del Sole concurred and dissented from the majority opinion. Judge Del Sole joined the majority in its evaluation of the "Motion[s] To Remove Nonsuits," but differed with the majority by concluding that the

"Amended Motion for New Trial and/or Judgment Notwithstanding the Verdict" was sufficient to raise and preserve issues of alleged error. No mention of the constitutional claim which the Kings are now asserting was made in either the majority or the dissenting opinion.

On March 21, 1986, the Kings filed the Application for Reargument and/or Reargument *En Banc*, which was denied by Order of the Superior Court on April 28, 1986. (Petition at A2).

On May 28, 1986, the Kings filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The only question presented in the Kings' Petition for Allowance of Appeal was "Whether Petitioners Motion for New Trial is procedurally and substantively sufficient as required by Pennsylvania Rule of Civil Procedure 227.1." This petition was denied by Order of the Supreme Court of Pennsylvania on May 4, 1987. (Petition at A1).

On August 3, 1987, the Kings filed the Petition for a Writ of Certiorari ("Petition") which is presently before this Court, and for the first time in any stage of these proceedings allege that they were denied due process of law under the United States Constitution.

SUMMARY OF ARGUMENT

The Petitioners cannot assert that this Court has jurisdiction over the federal constitutional question presented because they failed to raise the question at any point during the proceedings below.

This Court should not exercise its discretion in favor of granting a writ of certiorari because the Petitioners failed to set forth any "special or important reasons" why this Court should review this case, and because no such

reasons exist in light of the proceedings below and prior precedent of this Court.

ARGUMENT

I. According To This Court's Own Decisions, The Petitioners' Failure To Raise, At Any Point During The State Court Proceedings, The Federal Constitutional Question Now Presented Deprives This Court Of Jurisdiction Over The Question.

According to its own decisions, this Court lacks the jurisdiction to decide the federal constitutional question presented by the Petitioners because the question was not raised at any time during the state court proceedings below. The decisions cited by the Petitioners, Petition at 7-9, discuss the question of whether the existence of adequate state grounds for a state court decision can prevent this Court from considering a properly asserted constitutional claim. Those decisions are inapplicable to the facts of this case because Pa. R.Civ.P. 227.1 was not used to foreclose consideration of the Petitioners' constitutional claim, but was used instead to dismiss their post-trial claims which were based on state law.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 1163, 22 L.Ed.2d 398, 400 (1969). The constitutionality of the trial court's application of Rule 227.1 was not raised as an issue at any time during the proceedings below, so the Petitioners cannot now assert the constitutional claim in order to obtain review by this Court.

Petitioners claim that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3), but they have failed to set forth the manner in which the constitutional claim was properly asserted in the state courts.[1] (Petition at iv). Application of §1257(3) "requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which [they] now seek to have this Court enforce." *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 1891, 68 L.E.2d 392, 396 (1981). Petitioners are correct in asserting that it was impossible to assert the constitutional claim during the trial court proceedings because the alleged due process violation occurred in the manner in which the trial court rendered its final decision (Petition at 4). The Petitioners, however, failed to raise the federal question in the state appellate courts as required by prior decisions of this Court. In their attempt to comply with Rule 21.1(h)[2] of Rules of the Supreme Court of the United States, the Petitioners can only cite to *one sentence* in their Petition for Allowance of Appeal to the *Supreme Court* of Pennsylvania (as opposed to the Superior Court, where the issue should have been raised originally) in which the words "due process" are mentioned. This singular use of the phrase "due process" is not an acceptable way of raising and preserving a constitutional issue in the state courts under this Court's decision in *Webb*.

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[1]When the state appellate courts fail to pass upon a federal question, as is the case here, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.E.2d 572, ___ (1969).

[2]The pertinent portion of that Rule requires that the Petitioner specify in his statement of the case the stage in the proceedings below at which the federal question was raised.

The facts of the instant case are analogous to those of *Webb*. In *Webb*, this Court held that it lacked jurisdiction to decide the constitutional question presented, even though the petitioner had used the phrase "full faith and credit" several times during the proceedings below. This Court noted that the petitioner had failed to cite to the Federal Constitution or to any case relying on the Full Faith and Credit Clause of the Federal Constitution. *Webb*, 451 U.S. at 496, 101 S.Ct. at 1891, 68 L.E.2d at 396. This Court also noted that the federal question at issue was not mentioned anywhere in the majority opinion or in the dissenting opinion of the state supreme court. The Petitioners in the instant case likewise failed to raise the constitutional claim at any point during the proceedings below and now allege that the federal question was raised by the rhetorical use of the phrase "due process" in their petition to the Pennsylvania Supreme Court. Since the constitutional issue was never raised in the Superior Court, neither the majority opinion nor the dissenting opinion mentioned it. This Court's decision in *Webb* dictates that jurisdiction over the question presented in the Petition is lacking.

The cases cited by the Petitioners, Petition at 7-9, are inapplicable to the jurisdictional issue in this case. Those cases involved situations where it was argued that this Court did not have jurisdiction over a federal constitutional claim which had been asserted in the state court because the state court decision had been based on adequate state procedural grounds. This Court decided in those cases that the state procedural rule at issue had been applied in a novel or inconsistent manner and that the unique application of a state procedural rule would not deprive this Court of jurisdiction over a constitutional claim. *See, e.g., N.A.A.C.P. v. Alabama*, 377 U.S. 288, 84

S.Ct. 1302, 12 L.E.2d 325 (1964). This proposition is inapplicable to the instant case because Rule 227.1 was not applied to foreclose consideration of the Petitioners' federal constitutional claim.[3] Rather, Rule 227.1 was used to dismiss the Petitioners' post-trial motions for relief which were based on *state law* grounds, not constitutional grounds, and the Rule was applied in a manner consistent with the relevant Pennsylvania precedent. *See King v. Clare,* No. 321 (Pa. Super. 1985) (Petition at A3). The Superior Court did not apply Rule 227.1 to foreclose assertion of either a federal constitutional claim or the state law procedural claim. The Superior Court did, in fact, decide the state law procedural claim against the Petitioners, and it was the Petitioners' own failure to raise their constitutional claim in the Superior Court that caused that court to decide *only* the state law procedural claim.

In order for the cases cited by the Petitioners to be applicable to the instant case, the Petitioners first would have had to assert their constitutional claim in Superior Court. The Superior Court or the Supreme Court of Pennsylvania then would have had to deny relief by application of a procedural rule, perhaps Pa. R.App.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). The state court would also had to have applied the state procedural rule in a manner which was novel or inconsistent with past Pennsylvania precedent. This, however, is not the situtation in the instant case, so the cases cited by the Petitioners are irrelevant.

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[3]As stated above, the federal constitutional claim was never raised in the state court proceedings.

This Court should deny the Petition because of the Petitioners' failure to raise the constitutional claim at any point during the state court proceedings below.

II. No "Special And Important Reasons" For This Court To Review This Case Were Alleged In The Petition, Nor Do Any Reasons For Review Exist.

The Petitioners failed to set forth in their Petition any reason why this Court should review this case. The Petitioners assert that this Court's jurisdiction can be based on 28 U.S.C. §1257(3), and have filed their Petition to that effect. The considerations which govern whether an appeal will be allowed by this Court on a writ of certiorari are set forth in Rule 17 of the Rules of the Supreme Court of the United States. Rule 17 explicitly states that the review which the Petitioners seek is a matter of this Court's discretion, not a matter of right. Review will be granted "only when there are special and important reasons therefor." Rule 17 also contains indications of the character of the reasons that the Court will consider in making the decision as to whether to grant review. Those considerations include:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17.

The Petitioners have not set forth a single case with which the Superior Court's decision is in conflict, nor have the Petitioners set forth any "special or important reasons" which would justify the exercise of this Court's discretion in favor of granting the writ of certiorari.

The Petitioners do cite to several cases in the Petition, but they are irrelevant to the issue of whether this Court *should* review this case. As noted above, each of the cases cited by the Petitioners stands for the proposition that review by this Court of a constitutional right which was properly asserted during the state court proceedings cannot be barred on the theory that the state court decision rests on "adequate state grounds" when those grounds are based on the novel or inconsistent application of a state procedural rule. This proposition is relevant only to the question of whether this Court *can* review this case, and is not at all relevant to the question of whether this Court *should* review this case.

Not only did the Petitioners fail to set forth any reasons why this Court should grant discretionary review of this case, but they also are unable to do so. The decisions of both the Superior Court and the trial court are in accord with the applicable precedent of this Court. "[T]he State certainly accords *due* process where it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Thomas v. Arn*, ____ U.S. ____, ____ 106 S. Ct. 466, 475, 88 L.E.2d 435, 448 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265, 279 (1982). Due process requires only that litigants be granted an *opportunity* for a meaningful hearing appropriate to the nature of the case. *Id.* The Petitioners had the opportunity to assert their constitutional claim in the argument to the Superior Court or in

their petition to the Supreme Court of Pennsylvania, but failed to do so. They also cannot claim that they never had an opportunity to argue that the trial court erred on the state law procedural issue because the Superior Court decided that very question in favor of the Respondents after full briefing and oral argument. There is nothing in the Petition which reflects a departure from sound judicial proceedings, and accordingly, the Petitioners can cite to no "special and important reasons" why this Court should exercise its discretion to grant review of this case.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Kings' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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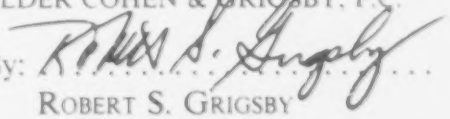
By: 

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No. 87-189
Term: October, 1987

CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief in opposition to the petition for certiorari filed in the above action was served upon counsel of record for all parties in this action by depositing a copy of said brief in the United States mail, first-class, postage prepaid, addressed as follows:

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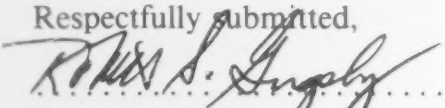

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